TECK NGEE CO. SDN. BHD.

v.

TAI TIAN LAI SAGO MILL & ANOR.

HIGH COURT SABAH & SARAWAK, SIBU
CHONG SIEW FAI J
[APPLICATION FOR EXECUTION NO. 10 OF 1989]
14 MAY 1990

CONTRACT: *Sale of goods - Agreement to sell diesel engine - Terms and conditions intention of parties - When does property pass - Section 19(1) Sale of Goods Act 1979 - Whether registration required - Whether claim to engine lost because of alterations - Doctrine of intermixture of goods - Whether identifiable.*

The plaintiff (judgment creditor) seized a motor vessel with an engine fixed therein which was to be put up for sale by public auction. The intervener obtained leave to intervene and the auction sale was stayed pending the intervener's application whereby they claimed title to the engine. The claim to the title in the engine was based on an agreement for the sale of the engine by the intervener to the defendant (judgment debtor). The agreement stipulated *inter alia*, that the property in the said engine was only to pass to the purchaser (judgment debtor) from the vendor after final payment of all instalments due under the agreement which was entered into. The judgment debtor had defaulted in their instalments to the intervener. The judgment creditor contended that they had no notice of the intervener's interest in the said engine and that the interveners were estopped from making the claim by reason of delay. Further, it was contended that the principle of intermixture and confusion of chattels applied and that the interveners had lost their title to the engine. The engine was fixed to the motor vessel by bolts and screws and was identifiable. The central issue for determination was whether the proprietary rights of the engine remained with the applicant or with the plaintiff.

Held:

[1] Parties in a contract for the sale of goods are free to agree on the time at which, and the conditions on which, property in the goods is to pass from the seller to the buyer - see s. 19(1) of the Sale of Goods Act 1979.

[2] The doctrine of confusion or intermixture of goods does not apply to distinct chattels such as engines. Among the factors to be considered are the subject matter and the extent and method of fixation.

[3] On the facts of this case, the proprietary rights of the engine remains with the intervener and had not at any material time vested in the judgment creditor.

[4] The judgment creditor's lack of knowledge or notice of the intervener's interest did not affect the intervener's claim to the title in the engine.

[Intervener's application allowed. Costs to be paid by judgment creditor to intervener.]

Cases referred to:

Smith v. Torr [1862] 3F & F 505
Appleby v. Myers [1867] LR 2 CP 651
Hobson v. Gorringe [1897] 1 Ch 182
Crossley Brothers Ltd. v. Lee [1908] 1 KB 86
Hendy Lennox Ltd. v. Grahame Puttick Ltd. [1984] 2 All ER 152

Legislation referred to:
Civil Law Act 1956, s. 5(2)
Sale of Goods Act 1979 [UK], s. 19(1)
Sale of Goods Act 1893 [UK], s. 19(1)
Stamp Act 1949, s. 4

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 35, paras. 1136 and 1138

For the applicant/intervener - Robin Hii; M/s. Robin Hii & Co.
For the plaintiff - Wong Woan Sii; M/s. Teo & Co.

JUDGMENT

Chong Siew Fai J:

This is an application by the Tokyo Trading Company (Tokyo Trading) to intervene and to stay the public auction sale of a second-hand Yanmar diesel engine CA2G 0571 (the engine) by way of execution taken out by the plaintiff/judgment-creditor against the defendant/judgment-debtor.

On 14 October 1985 the judgment-creditor obtained a judgment against the judgment-debtor in the sum of RM173,334.77, interest and costs. To recover payment, the judgment-creditor seized from the judgment-debtor a motor vessel with the engine fixed therein which the judgment-creditor intended to put up for public auction to be held on 7 April 1990.

Upon application by Tokyo Trading, I, on 26 March 1990, granted leave to Tokyo Trading to intervene and the auction sale scheduled for 7 April 1990 was also stayed pending the disposal of this application.

The basis upon which Tokyo Trading relies its application and which is not disputed, is that by an agreement dated 15 March 1988 Tokyo Trading, as vendor, agreed to sell the engine to the judgment-debtor for RM9,500 of which a sum of RM3,000 was paid as deposit upon signing of the agreement and the balance RM6,500 with interest RM2,340 was to be paid by 24 monthly instalments of RM368.35 each commencing from April 1988 payable on or before 15 of each month until full settlement of the purchase price and the interest aforesaid, that by reason of the judgment-debtor's defaults in payment which by 15 August 1989 amounted to RM4,420.20, Tokyo Trading claims title to the engine by virtue of Clause 7 of the agreement which reads:

> The property of the said engine shall not pass to the purchaser from the vendor until the final payment of all instalments due under this agreement has been made.

It is desirable to allude to some of the terms and conditions of the agreement for upon them rests the ascertainment of the nature and character of the contract as well as the rights and obligations of the parties thereto. I have just reproduced Clause 7.

Clause 9 of the agreement stipulates punctual payment of the instalments by the judgment-debtor; Clause 6 requires the judgment-debtor to keep the engine in good and serviceable condition; Clause 11 permits Tokyo Trading to examine its condition and state of repair; Clause 10 prohibits sale, pledge, charge or disposal of the engine by the judgment-debtor except under certain condition which is not relevant for our purpose, and Clause 12 thereof enables Tokyo Trading to determine the agreement and regain possession of the engine upon happening of certain events including the default of payments of the monthly instalments.

Having regard to the terms and conditions of the agreement and the circumstances of the case, it is, in my opinion, clear that, so far as is relevant to the issue of this case, the intention of the Tokyo Trading and the judgment-debtor is that the property in the engine is not to pass to the judgment-debtor until the agreed purchase price and the stipulated interest have been fully paid.

In point of law, parties in a contract for the sale of goods are free to agree on the time at which and the conditions on which property in the goods is to pass from the seller to the buyer. While it may be true that in such a contract, the inclusion of clauses for retention of title and postponement of passing of the property of the goods till sometime after delivery of the goods are usually brought about at the insistence of the sellers and for their own protection, there can, generally speaking, be no valid legal objection to it. [See s. 19(1) of the Sale of Goods Act 1979 or 1893 (English) by virtue of s. 5(2) of the Civil Law Act 1956].

It is common ground that the engine was fixed to the motor vessel by bolts and screws and that it is identifiable.

At the hearing on 3 May 1990, Counsel for the judgment-creditor abandoned the issue relating to stamp duties or stamping of the agreement. The affidavit of Chua Yong Tien affirmed on 26 February 1990 and filed on behalf of the judgment-creditor, however, raises several points which were not at all argued by Counsel and which may be briefly of as follows:

(a) That the agreement was not registered or endorsed on the Register of the Marine Fisheries Department, Mukah. It has not been shown under what law does the agreement in question require registration or endorsement with the said department in Mukah. Nor am I aware of any such law. The point has no merit. Closely connected thereto is the contention, which accordingly must also fail, that by reason of the contended non-registration with the said department, Tokyo Trading had lost its right to intervene. (Paragraphs 5 and 12 of Chua's said affidavit).

(b) That the judgment-creditor had no knowledge or notice of Tokyo Trading's interest in the said vessel (para. 5 of Chua's said affidavit) and that the judgment-creditor did not until 22 January 1990 receive any complaint or notice from the intervener, Tokyo Trading. (Paragraphs 8 and 11 of Chua's said affidavit). I fail to see how the lack of knowledge, notice or complaint could affect the relief sought in the present application. The engine has not yet been sold under the execution proceeding. The central issue is: With whom does the property of the engine lie, the judgment-debtor or Tokyo Trading?

(c) There is, in my opinion, no merit in the contention that Tokyo Trading should be estopped from making its claim by reason of delay. (Paragraph 13 of Chua's affidavit).

(d) That the agreement was not registered in accordance with item 4 of the 1st Schedule to the Stamp Act 1949. (Paragraph 4 of Chua Yong Tien's affidavit affirmed on 19 April 1990). With respect, I do not read the said schedule or any item thereof nor s. 4 of the said Act to which the 1st Schedule made reference, to contain anything requiring registration of any agreements. The schedule merely sets out the types of instruments chargeable with the various duties as therein specified. But if by the contention is meant that no stamp duty was paid respecting the agreement, the point has, as stated earlier, been abandoned.

The only remaining point of the judgment-creditor deserving some serious discussion is the contention that since the engine had been fixed and attached to the motor vessel SF2779, Tokyo Trading had lost its right to claim interest in the engine. Cited in support were various authorities with which I shall now deal.

Reference was made to the following passages in paras. 1136 and 1138 of Vol. 35 of the *Halsbury's Laws of England,* 4th Edn. The paragraph relates to acquisition of ownership:

> *Re Para. 1136:*
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> ...; but it appears that, in modern law, alterations to a chattel divest the owner's title only when the chattel has been worked into the property of another ...
> (Emphasis added)

The above quoted passage is a general statement. Furthermore, footnote 8 in the passage refers to para. 1139 which relates to the doctrine confusion or intermixture of goods such as corn, wine, oil and would not, in my opinion, apply to distinct chattels such as engines: See *Smith v. Torr* [1862] 3 F & F 505 at 506 per Bramwell B. The passage in para. 1136 quoted above must be read in the light of the case from which the statement of law derived.

The passage quoted from para. 1138 reads:

> Similarly, when the goods of one person are affixed to the land or chattel, for example a ship, of another, they may become part of it and so accrue to the owner of the principal thing. (Emphasis added)

Again, this is a general statement of law. Much depends on the facts of each particular case, and this is equally true of cases when materials are affixed to a ship. Among the factors to consider are the subject-matter fixed to a ship and the extent and method of fixation. The illustrations given in the following passage in *Appleby v. Myers* [1867] LR 2 CP 651 at 659 quoted on behalf of the judgment-creditor demonstrate this. At p. 659, Blackburn J said:

> Bricks built into a wall become part of the house, thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship;...

The question is: Does an engine transacted under an agreement containing terms and conditions as in the present case and fixed to a boat of the judgment-debtor come within the ambit of Blackburn J's examples quoted above. For the reasons given herein later, I think not.

Likewise, the following passage in para. 3284 of *Chitty on Contracts,* Vol. 2, 25th Edn.:

> Goods let on hire-purchase which are attached to, or combined with, goods which are the property of another person may be affected by the common law principles of accession and confusion of chattels

is a general statement that may or may not apply depending, in my view, on the particular facts and circumstances of each case.

As regards *Hobson v. Gorringe* [1897] 1 Ch. 182 and *Crossley Brothers Ltd. v. Lee* [1908] 1 KB 86 relied on by the judgment-creditor, these cases relate to engines fixed to land as opposed to movables. Unlike our instant case, there the law of fixture called for consideration. In *Hobson's* case, there is also the element of priority claim of the mortgagee. Different considerations apply in those cases.

In our instant case, the engine was annexed to the vessel by bolts and screws. It is identifiable. Somewhat similar point arose in *Hendy Lennox Ltd. v. Grahame Puttick Ltd.* [1984] 2 All ER 152. There diesel engines were supplied on credit terms under contracts which stipulated, *inter alia,* that the goods were to remain the property of the vendor until the full purchase price thereof had been paid. The engines were used as a major component of diesel generating

sets but the engines remained readily identifiable by a serial number and could be disconnected from the generators relatively easily. On the question of whether the vendor still retained proprietary rights when the engines had been incorporated into the generator sets, Staughton J after considering some authorities and law book said (at p. 159):

> ... I am aware that until very recently the radio and radar apparatus on a ship was commonly hired by the shipowner rather than bought by him. No doubt it was attached to the ship; but I do not suppose that it thereby became the property of the shipowner or his mortgagee. Nor in my judgment would an engine which was the property of A become the property of B merely because B incorporated it in a generator set otherwise composed of his own materials.
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> Those reflections and the facts of this case persuade me that the proprietary rights of the sellers in the engines were not affected when the engines were wholly or partially incorporated into generator sets. They were not like the Acrilan which became yarn and then carpet (the *Bond Worth* case), or the resin which became chipboard (*Borden's* case), or the leather which became handbags (the *Peachdart* case), or the grapes, olives, wheat and barley mentioned by Crossley Vaines. They just remained engines, albeit connected to other things.

With the above observations, I respectfully agree.

Having regard to the terms and conditions of the agreement, the facts and circumstances of the case and in the light of the authorities considered, I am of the view that the proprietary rights of the engine remain with Tokyo Trading and had not at any material time vested in the judgment-creditor.

The application in terms of prayer (b) of the summons dated 9 December 1989 as amended is allowed with costs to be taxed (unless agreed) and paid by the judgment-creditor to the intervener Tokyo Trading.

Also found at [1990] 2 CLJ 302